Supreme Court, U.S.
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No. 90-1338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

COALITION OF CITIES FOR AFFORDABLE UTILITY RATES, OFFICE OF PUBLIC UTILITY COUNSEL, CITY OF BRIDGE CITY, *et al.*, and PUBLIC UTILITY COMMISSION OF TEXAS,
Respondents.

On Petition For Writ Of Certiorari To The Texas Supreme Court

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BRIEF OF RESPONDENTS BRIDGE CITY, *et al.*, IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Court should become involved in the application of *res judicata* to state law disputes, contrary to traditional principles of comity and the law as established by Congress and the Court, *where* (a) petitioner failed to raise timely its "federal" claim; *and* (b) there is an independent and adequate state law basis for decision?

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BRIEF OF RESPONDENTS BRIDGE CITY, *et al.*, IN OPPOSITION TO PETITION

Respondents, Bridge City, Groves, Nederland, Port Arthur, Port Neches, and Vidor (Bridge City), submit this brief in opposition to the petition.

STATEMENT OF THE CASE

A. Introduction.

Petitioner[1] barely discusses the two fatal defects that render review here wholly inappropriate. First,

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[1] Petitioner is also referred to as "GSU."

it is plain from the petition that the Court should not consider GSU's federal claim for the simple reason that it was not raised timely below. GSU's failure to do so is entirely dispositive of the petition. Second, petitioner avoids any mention of an additional impediment to review, which is the existence of an independent and adequate state law basis for decision. Because of this, any decision by the Court would be advisory only.

Instead, petitioner urges involvement of the Court in the application of *res judicata* to state law disputes, and in so doing fails to acknowledge the serious damage to comity and federalism that such an approach would cause, and that such a course is in fact contrary to law as established by the Congress and this Court. But more simply, review should not be granted because, as petitioner concedes, there is no conflict of any sort between courts, state or federal, and there is no other compelling reason to consider petitioner's novel argument.

B. The Prudence and Rate Hearings.

GSU had the singular distinction of being the only utility in the nation to begin construction of a nuclear power plant following the accident at Three Mile Island in 1979.[2] When ultimately completed, the River Bend nuclear plant cost $4.5 billion,[3] almost three times the original estimate of $1.7 billion.[4] It is the fourth or fifth most expensive power plant ever built on a per kilowatt basis.[5]

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[2] Public Parties Committee Exhibit 1 at 40.

[3] Final Order, Finding of Fact 22 (App. 51a).

[4] Final Order, Finding of Fact 19 (App. 50a).

[5] Final Order, Finding of Fact 23 (App. 51a).

The dispute below originated with a 1986 application by GSU to recover its investment in River Bend, whereby it sought an increase in its Texas retail electric base rates of $153 million, or 28.1%. App. 110a. Bridge City and others intervened in the rate case (No. 7195) before the Texas Public Utility Commission (PUC), which consolidated it with the prudence inquiry (No. 6755).[6]

The prudence hearings were extensive and exhaustive. The parties spent more than $12 million[7] in a hearing that lasted 132 days (of which 101 were devoted to prudence),[8] and involved over 50 GSU witnesses and dozens presented by other parties. As petitioner conceded, "[e]very factual, legal and policy issue was thoroughly explored and canvassed,"[9] and the record, as compiled, was complete.[10]

According to established ratemaking principles, Gulf States bore the burden of proof to show that it prudently incurred its River Bend costs.[11] It failed to meet that burden. App. 86a. Its contention that "new proof requirements" were imposed *after* the record was closed (pet. at 3), requiring GSU to "present

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[6] The PUC examined the prudence and efficiency of the planning and management of the construction of River Bend.

[7] Final Order, Attachment - Rate Case Expenses (App. 95a).

[8] Examiners' Report, at 3.

[9] GSU's Reply to Exceptions to Examiners' Report, at I-1.

[10] Final Order Meeting, January 19, 1988, Tr. at 843, 970.

[11] Tex. Rev. Civ. Stat. Ann. art. 1446c, §40 (Vernon's 1991); *Suburban Utility Corp. v. Public Utility Commission*, 652 S.W.2d 358 (Tex. 1983); *Public Utility Commission v. Houston Lighting & Power Co.*, 778 S.W.2d 195, 198 (Tex. App. - Austin 1989, no writ).

studies justifying all [project] cost growth" (pet. at 6), is erroneous. GSU presented both a "cost reconciliation" (a method of justifying cost growth)[12] and a "statistical analysis"[13] at hearing, but the Commission found that *both* presentations fell short of meeting GSU's evidentiary burden.[14] Similarly, the administrative law judges (ALJs) rejected GSU's evidence on cost reconciliation:

> GSU did not present any credible reconciliation of plant costs with specific causes, much less with specific regulatory changes. Even if the causes for change were legitimate, it did not show that the amounts of money spent to meet various goals were reasonable. It did show more generally that regulatory changes had a dramatic effect on the project's scope and cost. Yet from the evidence one cannot tell how wisely and efficiently money was spent on design development, scope changes, and meeting regulatory changes.[15]

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[12] A cost reconciliation is a justification for cost growth above a benchmark estimate, with a specification of causes for the cost growth, and a showing of the prudence of cost overruns.

[13] A statistical analysis attempts to show that the costs of a plant are reasonable by means of statistical comparison to other plants' costs.

[14] Final Order, Findings of Fact 163 (App. 63a) and 132 (App. 62a).

[15] Examiners' Report at 128 (App. 181a). The petition mischaracterizes the ALJs' recommendations, and omits from its appendix those portions of the report damaging to GSU. *See* Examiner's Report at 15-16 (GSU's discussion of *Utah Construction* in a manner deviant from its present expressed view); Ex-

A former GSU Vice President summed up the utility's dilemma succinctly: "GSU doesn't know why River Bend cost so much."[16]

The Commission's Order determined that a portion of River Bend costs ($2.27 billion) was reasonably incurred and includible in rates, but that the remainder ($1.45 billion) had not been shown to be prudently incurred. The Commission concluded,

> GSU has *not* met its burden of proving that the capital costs of River Bend above a reasonable definitive cost estimate of $2.273 billion were reasonably and prudently incurred.[17]

As a result, such costs were not included in rates.[18] The Commission purported, although *ultra vires*, to permit GSU in a subsequent rate proceeding to seek, again, to justify such costs.[19] App. 85a. GSU then filed a motion for rehearing to sever these costs for retrial,[20] but the request was denied.

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aminer's Report at 17 (GSU's argument, at variance with its petition here, that the PUC is precluded by state statute from altering an earlier order).

[16] Examiners' Report at 128 (App. 181a), *citing* OPC Exhibit 32 at 173.

[17] Final Order, Conclusion of Law 18A (App. 86a) (emphasis added).

[18] Final Order, Findings of Fact 164 and 164A (App. 64a); Conclusion of Law 18A (App. 86a).

[19] Both the majority and the dissenting opinions of the Texas Supreme Court concluded that such a relitigation would be unlawful. App. 9a, 11a.

[20] GSU Motion for Rehearing at II-35-36.

C. Judicial Review of the PUC Order.

Petitioner and intervening parties sought judicial review of the Commission's Order in the Travis County District Court, as provided by statute.[21] The actions were consolidated into Cause No. 447,502, *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission of Texas*. "All issues" relating to the findings and conclusions of the PUC "remain to be addressed" there (App. 9a n.7), including whether the PUC Order is supported by substantial evidence, has a rational basis, or properly "balanced" the interests of consumers and investors. Briefing is complete, and oral argument is to be scheduled by the court.

D. Petitioner's Collateral Filing and Appeals.

In March 1989, after initiation of judicial review, Gulf States filed a new rate case at the Commission requesting, *inter alia*, a second hearing on the prudence of River Bend costs not previously found justifiable. The Commission set the application for hearing. Several parties then filed suit in Travis County District Court seeking to enjoin such relitigation of these charges.

The district court issued a permanent injunction precluding further hearings. The court of appeals dissolved the permanent injunction, and the Texas Supreme Court reversed. *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission*, 798 S.W.2d 560 (1990). The supreme court, affirming the district judge, held that: (1) GSU's second rate filing was barred by *res judicata* because "[t]he party

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[21] Tex. Rev. Civ. Stat. Ann. art. 6252-13a §19 (Vernon 1991).

who has the burden but fails to persuade the trier of fact is not entitled to a second trial to present more evidence" (App. 6a); and (2) the PUC did not possess the "statutory power to defer and reconsider such critical issues." App. 6a. No federal constitutional question was raised.

REASONS FOR DENYING THE WRIT

A. Petitioner's Federal Claim Was Not Preserved Below

The petition is fundamentally defective in failing to present a federal question that was "timely and properly raised so as to give the Court jurisdiction." S. Ct. R. 14(h); *see Webb v. Webb*, 451 U.S. 493, 496-97 (1981). GSU's argument here, that the fourteenth amendment conflicts with or circumscribes the application of Texas law, was not made in any court below, as clearly shown by its pleadings.

Petitioner seems to admit this. It says that it "relied on a decision" of the Court (Pet. at 9), *not* that it properly articulated a federal question. The decision purportedly "relied on" was *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), but petitioner did *not* argue that *Utah Construction* limited the application of Texas law.[2] Indeed, *Utah Construction* was cited in conjunction with Texas state court decisions, which petitioner indicated were *con-*

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[2] A "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U.S.C. § 1257(2)." *Board of Directors v. Rotary Club*, 481 U.S. 537, 550 n.9 (1987).

sistent with the holding of this Court. App. 303a, 307a.[23]

Petitioner's failure to raise a federal question below renders review here inappropriate. Had it raised the question, the Texas courts would have had the opportunity to reconcile state law with any alleged federal obligations, or to identify an independent state law basis for decision. *See Webb*, 451 U.S. at 500 (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971) (" 'it would be unseemly in our dual system of government . . . to upset a state court [decision] without an opportunity to the state courts to correct a constitutional violation' "). In either event, the Court would not now be required to adjudicate the question in a vacuum, without an adequately developed record. *See Webb*, 451 U.S. at 500.[24] As the Court explained in *Cardinale v. Louisiana*,

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[23] The *only* reference to *Utah Construction* in Gulf States' brief to the Texas Supreme Court was as follows: "The logical beginning for any inquiry related to applicability of the doctrines of *res judicata* or collateral estoppel is the order or judgment from which the res or the matters allegedly disposed of originate. Only matters that have been finally adjudicated and determined can be deemed conclusive of the rights of parties in subsequent actions. *See, United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct 1545, 16 L.Ed.2d 642 (1966); *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985)." App. 303a.

In addition, no reference to "due process" or the "fourteenth amendment" can be found in Gulf States' papers. Finally, the decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), was not cited, nor discussed, as petitioner concedes. Pet. at 22 n.18.

[24] The dissenting opinion's reference to *Utah Construction* did not indicate that a *federal* question had been addressed. *See* App. 19a.

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

394 U.S. 437, 439 (1969).

Petitioner's belated attempt to raise federal claims on rehearing was simply insufficient. "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes *too late* unless the court *actually* entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (emphasis added) (*citing Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 137 U.S. 48, 54 (1890) and other cases). The supreme court's denial of rehearing made no mention of petitioner's argument. App. 34a.

Understandably, petitioner falls back on the assertion that it "could not have expected" the judgment below (pet. at 22 n.18), and thus should be spared from ordinary requirements. This argument is not available here. The Texas Supreme Court *affirmed* the decision of the district court. App. 30a-31a.[25] GSU

[25] Surprise may be claimed where "the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n.9 (1980). *Accord Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

did not raise its federal claim *either* in appealing the district court decision *or* in defending the court of appeals before the supreme court.[26] It is too late to do so here.

B. There Is An Independent And Adequate State Law Basis For Decision

There is an additional impediment to review. An independent and adequate state law basis for decision exists, *viz*: that, in addition to a common law *res judicata* bar, the PUC was without "*statutory* power to defer and reconsider such critical issues." App. 6a (emphasis added). The PUC's authorizing statute permits it to "reexamine" matters only in limited circumstances, not present here, and "[t]he Legislature . . . chose not to extend this authority [to reexamine] to ratemaking." App. 7a.[27] The petition does not challenge the Texas Legislature's decision so to limit the PUC's authority, nor could it. This statutory limitation would remain, regardless of the outcome here. Any ruling here would be advisory only:

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[26] Petitioner's articulation of the federal question in its motion for rehearing demonstrates, if anything, that it can do so in plain language, if it so intends.

[27] In Texas, an administrative agency has no power to relitigate or reconsider final adjudicative fact findings. *Al-Jazrawi v. Texas Board of Land Surveying*, 719 S.W.2d 670, 671 (Tex. App. - Austin 1986, writ ref'd n.r.e.); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 143-44 (Tex. App. - Austin 1986, writ ref'd n.r.e.); *Westheimer Independent School District v. Brockette*, 567 S.W.2d 780 (Tex. 1978). It may not create for itself power to relitigate an issue by purporting to reserve such right in an initial order (*Sexton*, 720 S.W.2d at 144), and if it attempts to relitigate a prior fact finding, it may be enjoined. *Id.* at 145.

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). *Accord Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983); *Abie State Bank v. Weaver*, 282 U.S. 765, 773 (1931).

C. Petitioner's Argument Is Contrary To Established Tests

The most revealing aspect of petitioner's request to involve the Court in state law disputes is its failure to cite even a *single* decision for support. This is so, perhaps, because the rule, as established by Congress and the Court, is that federal courts should respect, and apply, the *res judicata* rules of each state. Section 1738 of 28 U.S.C. requires federal courts to give the judgment of state courts "the same full faith and credit . . . as they have by law or usage" within the courts of that state. The result is:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-482 (1982); *accord Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Allen*

v. *McCurry*, 449 U.S. 90, 96 (1980). Accordingly, states "are left free to determine for themselves most of the details of *res judicata* doctrine." Wright, Miller & Cooper, Federal Practice and Procedure, § 4467, at 626 (1981). And in doing so, "state proceedings need do *no* more than satisfy the *minimum* procedural requirements" of due process. *Kremer*, 456 U.S. at 481 (emphasis added). The rule applies with equal force to state *administrative* determinations: "federal courts *must* give [a state] agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) (emphasis added).[28] This time-honored principle "serves the value of federalism." *Elliott*, 478 U.S. at 798.

GSU offers no valid reason to depart from settled law, and there is no basis to do so here. GSU was afforded the *maximum* protections allowable by law: extensive discovery, expert testimony, cross-examination, briefs, oral argument to the PUC, and a detailed order addressing factual and legal disputes. Further, the PUC order is subject to judicial review, which is currently underway in the Texas courts. *See supra* at 6. The Texas Supreme Court's order simply

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[28] Petitioner argues that administrative decisions present a special case because they (1) often accord litigants "few procedural formalities" (pet. at 13), which is not the case here, as described below; and (2) "may use adjudication as a policymaking technique" (pet. at 14), which is not pertinent (*National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance with the Board's discretion")), and no "new" policy was established. *See supra* at 3-4.

precludes the expenditure of similar resources and efforts a *second* time.[29]

Petitioner's argument boils down to reliance on language in *Utah Construction* allegedly restricting the application of *res judicata* to an order that "resolves disputed issues of fact" (384 U.S. at 422). But such a reading is of no assistance to GSU, as here the PUC plainly "resolved" factual issues in dispute when it held that GSU failed to meet its burden of proof (App. 2a-3a). That was rightly the end of the matter. It was GSU's burden to bear, and once it had failed to do so, and the PUC so determined, no *further* findings were necessary. In such an instance, the matter is "resolved" against that party:

> A party who fails to meet its burden of proof loses. The party who has the burden but fails to persuade the trier of fact is not entitled to a second trial to present more evidence.

App. 6a. That is the law in Texas.[30]

D. No Issue Of "Balancing" Under *Hope* Exists

Petitioner does not argue that *Hope* permits it to relitigate a failure of proof. Rather, by reason of its

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[29] The court also recognized the obvious unfairness of GSU's view of *res judicata*, which would permit GSU to relitigate matters it lost, but prevent relitigation of matters on which GSU prevailed (App. 5a), thereby allowing GSU "to secure victory not by the strength of its case but simply by outlasting its opponents." App. 9a.

[30] In Texas, findings of insufficient proof are binding. *Gerst v. Goldsbury*, 434 S.W.2d 665, 667 (Tex. 1967). Petitioner's argument that the PUC Order issued "without any determination whatever that those funds were imprudently expended" (pet. at 17) is thus, at best, uninformed.

own collateral action, petitioner seeks to have "balanced" *only* that portion of River Bend costs *excluded* from rates, ignoring the larger portion of River Bend costs *allowed* in rates. But under *Hope*, a "balancing" of consumer and investor interests must occur on judicial review of the PUC order *as a whole*, which is now occurring in Texas district court.[31] *There*, petitioner may contest the Order's *end result* under *Hope*, and it is doing so. GSU's pursuit of a one-sided "balancing," on a collateral track, is contrary to *Hope* and inappropriate.

E. The Case Does Not Merit Review

There is nothing in GSU's petition meriting review. No conflict between courts is alleged, nor exists. Petitioner's argument apparently has not been addressed by any court. There is no precedent to support it, and there are longstanding rules that virtually foreclose it. The argument should have been made, if at all, below.

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[31] Under the decisions of the Court, a rate order must be "viewed in its entirety" (*FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)), not "examined piecemeal." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989).

CONCLUSION

For all these reasons, the petition should be denied.

Respectfully submitted,

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